Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

Workplace Safety and Insurance Appeals Tribunal

Quarterly Production and Activity Report

April 1 to June 30, 2012

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Production Summary

At the end of the second quarter 2012, the active inventory totalled 5,185 appeals. This is approximately 6% higher than the active inventory at the end of the first quarter 2012.

Incoming Appeals

Incoming appeals numbered 1,298; of these, 1,176 were appeals from WSIB decisions, and 122 appellants advised they were ready to proceed to hearing following a period of inactive status.

This compares to 1,161 new appeals and 194 reactivated appeals recorded in the first quarter of 2012.

In the 2nd quarter of 2011, the Tribunal recorded 893 new appeals and 189 reactivations.

In 2011, the weekly average of hearing-ready appellants was 62. For Q2-2012, the weekly average of hearing-ready appellants is 67. This figure excludes cases reactivated from inactive status.

Dispositions

Dispositions in the second quarter of 2012 totaled 1,009. This includes 342 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 667 after-hearing dispositions; of the after-hearing dispositions, 647 followed from Tribunal decisions.

Inactive Inventory

At the end of Q2-2012, the inactive inventory was 2,516 cases (at the end of Q1-2012, the inactive inventory was 2,569 cases).

In Q2-2012, 85% of final decisions were released within 120 days. In 2011, 86% of final decisions were released within 120 days.

The Notice of Appeal Process

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2012, the notice inventory included 1,435 dormant cases, the active inventory totalled 5,185 cases, and the inactive inventory totalled 2,516 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2011	3885
Q2-2011	4009
Q3-2011	4195
Q4-2011	4428
Q1-2012	4898
Q2-2012	5185

B. Incoming Appeals

Period	Incoming Appeals
Q1-2011	1108
Q2-2011	1082
Q3-2011	1160
Q4-2011	1212
Q1-2012	1355
Q2-2012	1298

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2011	992	286	706
Q2-2011	993	309	684
Q3-2011	906	300	606
Q4-2011	937	313	624
Q1-2012	930	287	643
Q2-2012	1009	342	667

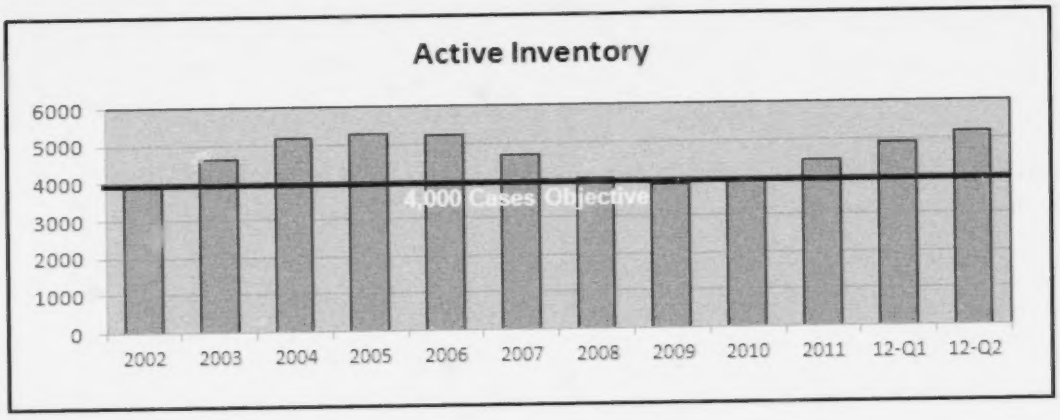
D. Inactive Inventory

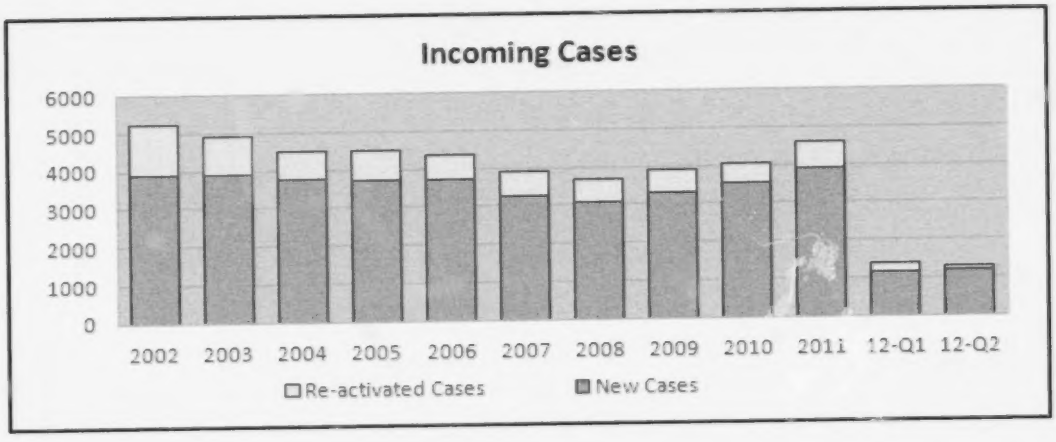
Period	Inactive Inventory
Q1-2011	2963
Q2-2011	2810
Q3-2011	2746
Q4-2011	2705
Q1-2012	2569
Q2-2012	2516

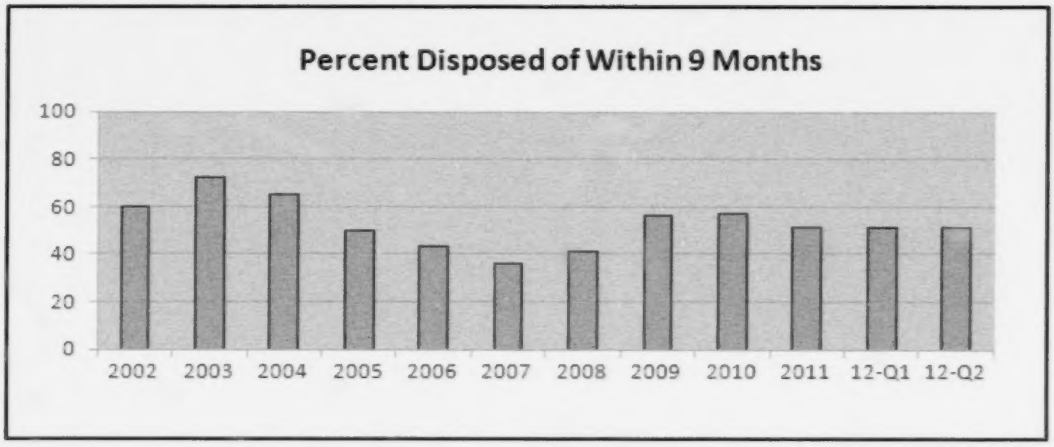
E. Notice of Appeal (Dormant cases)

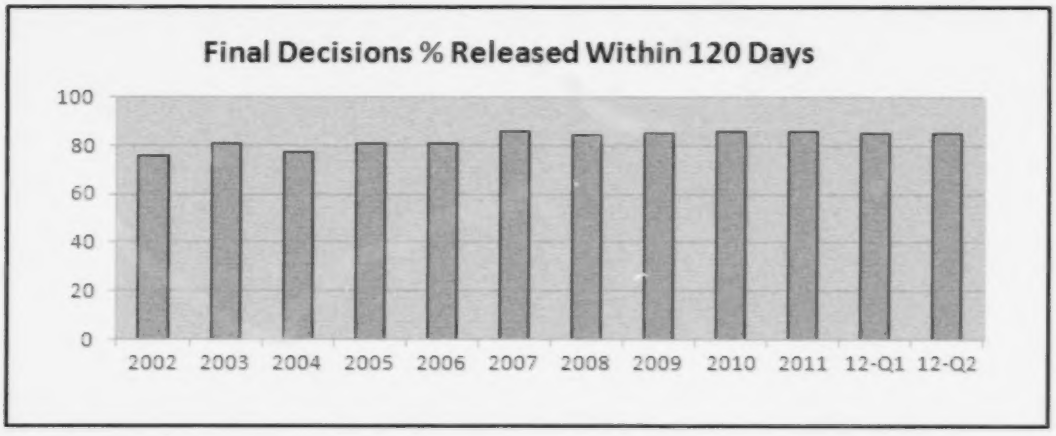
Period	Total Dormant	Change from Previous Quarter
Q1-2011	1400	83
Q2-2011	1367	-33
Q3-2011	1435	68
Q4-2011	1477	42
Q1-2012	1433	-44
Q2-2012	1435	2

F. Production Charts: From 2002 up to the end of the current quarter






Percent Disposed of Within 9 Months
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
12-Q1
12-Q2


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
12-Q1
12-Q2

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the second quarter of 2012 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. Decisions 1976/99I (November 30, 1999), 1976/99 (December 12, 2002) and 1976/99R (September 2, 2005)

The worker was granted entitlement on an aggravation basis for fibromyalgia from March 1991 until February 1992. Seven months later, the medical evidence showed the worker's condition had improved so she had only minor symptoms. She was expected to fully recover. In November 1991 the worker notified the Board she had recovered. For three years the worker did not see a doctor for her injury and made no further claim to the Board. Suddenly in November 1994 she notified the Board and her doctor that she was claiming further benefits for fibromyalgia, which she related to her work injury three and a half years earlier. The Board denied further benefits. The worker appealed to the Tribunal.

The hearing Panel denied further entitlement on the grounds that the worker was suffering from regional myofascial pain, rather than fibromyalgia.

A different Vice-Chair in the first reconsideration decision held the hearing Panel may have been mistaken, since both conditions fell under the Board's chronic pain policy. However, he also held that even if the worker continued to suffer from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker was disabled by a work injury, the medical reporting did not relate her condition to work, there were significant discrepancies in the medical reporting, and her allegation that her condition worsened from 1991 to 1994 suggested there was another intervening cause of her disability.

The worker brought six further reconsideration applications, all of which were denied. She then commenced an application for judicial review. The worker served her factum. Her factum was improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court. The Tribunal raised this with the Ottawa Divisional Court, and on October 12, 2010, Justice Linhares deSousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file such a factum.

On March 4, 2011, the worker's motion to be allowed to file a 55 page factum was heard by Justice Smith in Ottawa. Her request was not granted, but the Court did grant her 60 days to file a 45 page factum. The Tribunal was granted the right to file a 45 page factum in reply.

The judicial review was heard in Ottawa by Justices Aston, Whitten and Corbett on April 19th. The judicial review was unanimously dismissed. Justice Aston, who wrote the decision, noted that, "It is not our task to review and weigh the evidence nor to substitute our opinion for that of the Tribunal....The applicant has not established any basis upon which judicial intervention is warranted. The reasons for the decision meet the need for

justification, transparency, and intelligibility as set out in Dunsmuir and the decision itself falls within the range of reasonable outcomes."

2. Decisions 1110/06 (November 2, 2006), 1565/08I (July 25, 2008), 1565/08 (May 13, 2010) and 1565/08R (February 9, 2011)

The worker was injured in June 1990. He was granted an 18% NEL. He was granted a FEL sustainability award at D1 in 1992. He was also granted a FEL supplement while he participated in a vocational rehabilitation program. He was undergoing a retraining program when he was involved in a motor vehicle accident in 1993, forcing him to quit the program. The supplement ended when he withdrew from the program.

At R1 in 1994, the worker was granted a FEL based on earnings which assumed he had been able to complete the training program.

In 1997, the Board ruled that the worker had recovered from the 1990 accident and his ongoing back problems were actually the result of a pre-existing condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal. He claimed he was entitled to a 100% FEL award as he was unable to earn anything in suitable and available employment as a result of the 1990 work accident.

In Decision 1110/06, the Tribunal determined the worker's pre-existing condition had been asymptomatic at the time of the 1990 injury, so the work injury was a significant factor contributing to the worker's ongoing impairment. The Panel held the worker had ongoing entitlement, that he had a permanent impairment, and that the entitlement to benefits he had at the time of the 1997 Board decision should be restored. The Board was directed to reinstate the worker's benefits and determine his past and ongoing benefits.

Following Decision 1110/06, in 2007 the Board made a new FEL determination. The Board found the worker was only partially disabled because of his work injury, and his inability to work was due to the 1993 motor vehicle accident. The Board reinstated the NEL, but did not grant a full FEL. The Board awarded a smaller FEL starting in 1993 as it determined he could work as a civil engineering technician. The worker appealed to the Tribunal again.

In Decision 1565/08I, the Panel spent the first day of hearing considering the role of a person who appeared at the hearing with the worker and who characterized herself as a "facilitator." Following a lengthy discussion, it was decided that this person would characterize herself as a "friend" of the worker. As a friend, she would qualify under the exemption for a representative as set out in By-Law 4 passed pursuant to the *Law Society Act*; however, the Panel brought the circumstances of the case to the attention of the Tribunal Chair.

When the hearing reconvened, the Panel considered the worker's arguments that he was totally disabled before his motor vehicle accident, and hence he was entitled to a higher FEL.

In Decision 1565/08, the Panel found the worker was not totally permanently disabled before the motor vehicle accident. Further, the motor vehicle accident had a significant impact on the worker. The Panel found that the worker's inability to earn beyond the level determined by the Board was because of the motor vehicle accident. As a result, the Panel upheld the worker's D1 and R1 FEL award as determined by the Board.

However at the R2 date, the Board had found the worker would have been able to earn more, and hence have a lower FEL. The Panel allowed the worker's appeal on that issue, finding his earning capacity would not have increased. Thus the worker was entitled to a partial FEL commencing in 1993. The Panel also confirmed the Board's NEL determination.

In Decision 1565/08R, a different Vice-Chair denied the worker's application to reconsider Decision 1565/08, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of Decisions 1565/08 and 1565/08R. The worker is self-represented. The precise arguments which the worker intends to make are not yet apparent but the Notice of Application for Judicial review contains a myriad of allegations of breaches of natural justice, bias, and decisions made on no evidence. The Notice of Application also alleges that the second Panel was barred from making certain findings in light of the conclusions in the earlier decision, Decision 1110/06.

In light of the allegations in the Notice of Application and pursuant to its usual practice, the Tribunal asked the worker to order the transcripts of the Tribunal hearings for the Record of Proceedings. The worker refused. The Tribunal ordered the transcripts itself, and filed a Record of Proceedings which included the transcripts.

The worker brought a motion for an order to remove the transcripts from the Record, and to remove many of the materials pertaining to Decision 1110/06. The motion was heard in September 2011 by Madam Justice Swinton.

Following oral argument by the worker and Tribunal Counsel, Justice Swinton dismissed the worker's motion, accepting the Tribunal's arguments that, in the light of the allegations contained in the Notice of Application, the transcripts and materials from the prior appeal are properly included in the Record of Proceedings. Costs in the cause were awarded to the Tribunal.

The Divisional Court Registrar dismissed the worker's judicial review because he failed to perfect within a year of filing the judicial review. The worker brought a motion to set aside the Registrar's dismissal and extend the time to file his judicial review. The Tribunal did not consent to the motion, but also did not oppose it. On June 20, 2012, the motion was granted. The worker has been given until July 6th to perfect his judicial review.

3. Decisions 10/04 (May 19, 2004), 10/04R (December 29, 2004), 10/04R2 (September 7, 2005) and 10/04R3 (January 10, 2012)

The worker was injured in July 1986. He was paid total disability benefits until he returned to work in December 1986. In December 1987, he claimed he suffered a new

injury. He was paid total disability benefits until May 1989, when he was granted a 7% permanent disability pension. The worker was paid a s.147(4) supplement from November 1989 until November 1991, when the Board terminated the supplement.

He was (following an appeal to WSIAT and the release of Decision 1546/00) granted a s.147(2) supplement from November 1991 until March 1995. The Board sponsored the worker to attend university from 1995 to 1998, during which time he received s.147(2) benefits. In October 1998, his entitlement to s.147(4) benefits was terminated.

By 2000, the worker's pension had increased to 15%.

The worker appealed to WSIAT, seeking:

- a s.147(2) supplement from November 1, 1989, to November 1, 1991;
- a s.147(4) supplement after August 9, 1998;
- a finding that he sustained a new accident in December 1987, rather than a recurrence of the 1986 injury.

The worker's appeal was considered as a written case.

In Decision 10/04, the Vice-Chair held:

- the worker was entitled to a s.147(2) supplement from November 1, 1989, to November 1, 1991;
- the worker was not entitled to a s.147(4) supplement after August 9, 1998;
- the December 23, 1987, incident was a recurrence.

In regards to s.147(4) benefits after August 9, 1998, the Vice-Chair noted that the worker had already completed a vocational rehabilitation program and had an earning *capacity* (as opposed to his actual earnings) that approximated his pre-accident earning capacity under s.147(2). Consequently the worker was not entitled to a s.147(4) supplement after August 1998.

The worker applied to reconsider Decision 10/04 on the grounds that the Tribunal had no authority to terminate a s.147(4) supplement, that the Tribunal had failed to consider the increase in the worker's permanent pension, and the December 23, 1987, accident was a new accident, rather than a recurrence.

The Vice-Chair denied the reconsideration. He found the worker should never have received a s.147(4) supplement in the first place, because the evidence demonstrated that as of 1989, the worker would have benefitted from a s.147(2) supplement. Accordingly, he should have received a s.147(2) supplement, which was what the Vice-Chair had granted. A worker cannot receive both a s.147(2) and a 147(4) supplement at the same time. The Vice-Chair held the Tribunal has jurisdiction to determine eligibility for a s.147(4) supplement, though it may not be rescinded once entitlement is established.

The Vice-Chair also found the increase in the worker's pension was taken into account in the original decision, and that the December 1987 accident was a recurrence rather than a new accident.

The worker's application for a second reconsideration was denied by the same Vice-Chair in Decision 10/04R. The Vice-Chair confirmed that the Tribunal may find that

s.147(4) benefits can be rescinded where they should never have been granted. Here the worker was entitled to s.147(2) benefits because he could benefit from vocational rehabilitation services. When his earning capacity had been increased, he consequently was not entitled to a s.147(4) supplement for that period. The Vice-Chair also confirmed that the December 1987 incident was a recurrence, rather than a new accident.

The worker's applications for six further reconsiderations were denied by the Tribunal Chair. The worker retained counsel and commenced a ninth reconsideration application. Submissions made on behalf of the worker alleged a breach of procedural fairness, in that the original Vice-Chair did not notify the worker that his entitlement to s.147(4) benefits were at risk in the appeal. A new Vice-Chair held that the worker's counsel had raised an arguable case, so the employer was invited to make submissions on the threshold.

In Decision 10/04R3, the new Vice-Chair denied the application for reconsideration. In his reasons, the Vice-Chair stipulated that he was only considering the procedural fairness arguments, which had not been raised in prior reconsideration applications. These were:

- whether the Vice-Chair committed a procedural error in not giving the worker notice that his initial entitlement to section 147(4) benefits would be an issue under consideration;
- whether the Vice-Chair committed a procedural error in not advising the worker of the downside risk arising from his request for section 147(2) benefits from November 1, 1989 to November 1, 1991; and
- if either of these errors did exist, whether correcting them would likely produce a different result.

In regards to notice, the Vice-Chair acknowledged that initial entitlement to s.147(4) benefits was not identified in the list of issues in Decision 10/04, and the worker and employer were not given an opportunity to provide submissions on this issue. However, the parties were made aware that s.147 was in issue, and that should have been sufficient to put the parties on notice that the interplay between the different parts of s.147 were within the scope of the appeal. Section 147 is a comprehensive scheme of supplementary benefits for a permanent impairment, and its provisions cannot be read on a compartmentalized basis. Where a worker has claimed s.147(2) and (4) benefits for the same time period, it is not reasonable to argue that the Tribunal is precluded from considering one of them. In any event, the notice question is no longer relevant as the worker raised the issue of jurisdiction and had received two detailed reconsideration decisions.

In regards to downside risk, the Vice-Chair held there was no downside risk for the worker's entitlement to s.147(4) benefits from November 1989 to November 1991 when he claimed s.147(2) benefits. He noted that when the worker appealed to WSIAT, he had been paid s.147(4) benefits from November 1989 to November 1991, he had been paid s.147(2) benefits from March 1995 to August 9, 1998, and (pursuant to Decision 1564/00) had been paid s.147(2) benefits from November 1991 to March 1995.

The worker appealed for s.147(2) benefits from November 1989 to November 1991. In this he was successful, as the Vice-Chair granted him s.147(2) benefits during that period. Not only was the worker's appeal on the issue granted, his benefits were increased. It was not reasonable to characterize this result as a downside risk.

Following the release of this decision, the worker commenced an application for judicial review. He has filed a factum, and the Tribunal has filed its factum. As of the end of the quarter no date had yet been set for the hearing of the judicial review application.

4. Decisions 3164/00 (December 18, 2000), 3164/00R (March 28, 2001) and 3164/00R2 (March 6, 2012)

The worker worked in a donut shop. She injured her back in 1994. She was paid total benefits for about a month, then returned to work, and went off again for a further seven months. In 199,7 she was granted entitlement for a right elbow disability arising out of her job duties.

She appealed for entitlement for a FEL and further vocational rehabilitation arising out of the back injury. She also appealed ongoing entitlement for a right elbow condition. Finally she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

The Vice-Chair granted entitlement to a FEL and vocational rehabilitation assistance for the back injury. He denied entitlement for fibromyalgia and the right arm/elbow.

On the first reconsideration, the worker submitted additional medical documentation in support of her claim for fibromyalgia; however, the Vice-Chair found it was insufficient to warrant re-opening the appeal. The worker made five more reconsideration requests which the Tribunal Chair found did not meet the threshold to be assigned for review by another Panel or Vice-Chair.

In January of 2011, the worker retained new counsel and commenced an application for judicial review. A concern about the timeliness of this application was raised with counsel for the worker. In May 2011, the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a seventh reconsideration. The Tribunal agreed.

In Decision 3164/00R2, released on March 6, 2012, a different Vice-Chair denied a second application for reconsideration. In this instance, the Vice-Chair was also not persuaded that the additional medical evidence. He noted that the evidence was actually "reply" evidence, obtained in an attempt to refute the Tribunal's conclusion, rather than new evidence. Further, he did not find the additional evidence demonstrated that the original decision should be reconsidered.

The worker advised that she wished to proceed with the judicial review. The Tribunal served a supplementary record, and the worker filed a factum. At the end of the quarter, the Tribunal was preparing a factum.

5. Decisions 1791/07 (August 28, 2007), 1791/07R (March 3, 2008) and 1791/07R2 (September 21, 2009)

The worker, a kitchen helper, injured his neck in November 2004. He was granted LOE benefits from May 9, 2005, until the end of 2010. Entitlement was extended to include

his low back, shoulders, and chronic pain disability. The worker was also granted a 45% NEL award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psycho-traumatic disability, and the amount of a NEL award for chronic pain. The Tribunal held that the worker had no entitlement for carpal tunnel syndrome, that he was not entitled to a psycho-traumatic award, and that he was not entitled to an increase in his NEL award.

The worker commenced an application for judicial review. The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursued a further reconsideration.

The further reconsideration was denied by Decision 1791/07R2 (September 21, 2009).

The worker revived his application for judicial review. The application was heard in June 2010 by a Divisional Court Panel comprised of Justices Herold, Jennings and Lederman. At the outset of the hearing, the applicant abandoned the application in respect of the psychotraumatic disability award. The Court unanimously dismissed the application in respect of entitlement to benefits for carpal tunnel syndrome.

Although the time to seek leave to appeal a decision of the Divisional Court is 15 days, over eight months later the worker brought a motion to extend the time to seek leave to appeal to the Court of Appeal. The Tribunal opposed the extension.

On March 30, 2011, Justice Karakatsanis denied the time extension. She noted there was no evidence the Applicant had formed the intent to seek leave to appeal within 15 days, the delay here was significant, the Applicant's allegations about illness and being unable to find counsel were unsubstantiated and not compelling, there would be prejudice to the Tribunal if an extension was granted, and in any event there was no merit to the appeal.

Over a year later, the worker then asked the Supreme Court to review the decision of Karakatsanis J. The Supreme Court Registrar was of the view that there was no final order of the Court of Appeal and referred the worker back to the Court of Appeal to have the order of Karakatsanis J. reviewed by a three member Panel of the Court of Appeal. However, when the worker went back to the Court of Appeal, he was out of time to ask for such a review and so had to ask the Court of Appeal to extend the time in which to ask a three-member Panel of the Court of Appeal to review the order of Karakatsanis J.

The Tribunal opposed the worker's time extension request and filed a factum. As of the end of the quarter, the Tribunal was awaiting the decision of the Court of Appeal.

6. Decisions 834/09 (August 5, 2010) and 834/09R (April 15, 2011)

In this right to sue application, the applicants sought determinations as to whether the rights of action of Ms. M and Ms. R were taken away by the Act. Both Ms. M and Ms. R suffered serious injuries in a motor vehicle accident that occurred on November 18,

2005, when their van, driven by Ms. M, spun out while they were travelling on a highway. After the van came to rest, both Ms. M and Ms. R exited the van. While they were at the rear of the van, another driver, Mr. K, lost control his van near the same location as where Ms. M had lost control of the van she was driving. Both Ms. M and Ms. R were struck by K's van, and suffered severe injuries including the amputation of one leg each.

Ms. M was scheduled to work the morning of the accident. She attended the offices of A (the company) and delivered flowers to a synagogue. She loaded up the van with items to be delivered to a banquet hall for the next day's event.

Ms. R was not scheduled to work the day of the accident. She attended at A, the company's office, in the morning to collect her pay cheque. She intended to then meet her mother for lunch. Ms. M offered to drive Ms. R to the restaurant. They left the company's offices together in the van. After leaving the office, they stopped at the company's storage facility, where they loaded additional items for an upcoming event. The accident happened some time after leaving the storage facility.

Ms. M, Ms. R and their family members brought actions against various individuals and entities. The right to sue application was brought by the sole proprietor of the company, and the company from whom the van was leased, with a co-application brought by Mr. K and his company and the owner of his van, and the company which maintained the highway.

A, the company, was not registered with the Board at the time of the accident.

At issue in the application was whether A was a Schedule 1 employer; whether Ms. M and Ms. R were workers or independent contractors and whether they were in the course of their employment at the time of the accident; whether Mr. K was acting in the course of his employment at the time of the accident; and whether, if the actions of Ms. M and/or Ms R were taken away, the *Family Law Act* (FLA) claims were also taken away by the WSIA.

The Vice-Chair found that it was not necessary to decide A's classification, but rather whether A, a party décor business, was a Schedule 1 employer at the time of the accident. She found that while the words "party décor" are not specifically included in Schedule 1, the various components that make up party décor are found in Schedule 1. She found that A was compulsorily covered under Schedule 1.

The Vice-Chair found that both Ms. M and Ms. R were workers of A at the time of the accident. However, she found that Ms. M was in the course of her employment at the time of the accident, while Ms. R was not. She further found that Mr. K was in the course of his employment at the time of the accident.

The Vice-Chair concluded that Ms. R's action and that of her FLA claimants was not taken away by the WSIA. However, she found that Ms. M's action against the sole proprietor, Mr. K, Mr. K's employer, and the company which maintained the highway was taken away by the WSIA. The right of action of the FLA claimants in Ms. M's action was not taken away by the WSIA.

The Vice-Chair made no determination with respect to rights of action against the highway and the Ontario Ministry, as they did not participate in the application.

Both Ms. M and the applicants made requests for reconsideration of the decision. The reconsideration requests were denied.

Ms. M then commenced an application for judicial review, seeking a declaration that, at the time of the accident:

(i) A was not a Schedule I employer;
(ii) Ms. M was not a "worker" as defined by the WSIA; and
(iii) Ms. M was not in the course of her employment.

The Tribunal filed a Notice of Appearance. The other respondents have also filed Notices of Appearance. The Tribunal has been sending follow-up requests to the Applicant's counsel to provide transcripts so that the Tribunal can prepare and file the Record of Proceedings. To date the Applicant's counsel has failed to respond.

7. Decisions 512/06I (May 12, 2006) and 512/06 (November 2, 2011)

The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker LOE until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date of the employer.

The worker appealed to the Tribunal for LOE benefits after May 31, 2002, for his back, and also for benefits for a right shoulder injury. In Decision 512/06I, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002, until February 5, 2003, (which was two years after the injury) pursuant to s.43(1)(c) of the WSIA.

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened section 15(1) of the Charter.

The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as interveners. The OWA accepted, and became co-counsel with the worker's representative. The OEA withdrew from the appeal.

The hearing reconvened with a full Panel to consider the Charter issue. The majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of section 15 the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates s.15 of the Charter to be (a) if the Act creates a distinction based on an enumerated ground, and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65, that age 65 is still when most people retire, and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two year statutory limit. Further, a two year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as CPP. Viewed contextually, the majority found the two year limit does not perpetuate prejudice of workers aged 63 and older. Even if s.43(1)(c) did violate section 15 of the Charter, it constituted a reasonable limit under section 1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that s.43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might be entitled to if they had been younger. The Vice-Chair found that s.43(1)(c) was not saved under section 1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. At the Tribunal's request, the Applicant amended his pleadings to add the employer as a respondent. After the Tribunal filed its Record, counsel for the worker attempted to submit new evidence for the judicial review. As the respondents objected, counsel for the worker then attempted to commence an application to reconsider Decision 512/06, while the judicial review was still pending. The respondents objected to this approach as well. At the end of the second quarter, the parties were discussing ways to resolve these issues.

8. Decision 62/11 (August 22, 2011)

In Decision 62/11, the Vice-Chair denied the worker's appeal for full LOE benefits subsequent to April 1, 2008. She also denied the employer's cross-appeal for SIEF.

Counsel for the worker served the Tribunal with a Notice of Appeal, which she filed in the London Divisional Court.

The Tribunal wrote to the worker's counsel to point out there is no appeal from a Tribunal decision by virtue of section 123(4) of the WSIA.

On December 1, 2011, the London Divisional Court dismissed the judicial review application for delay, with costs fixed at $750.00. The Tribunal has requested payment of these costs. Counsel for the worker had failed to respond to letters from the Tribunal about the outstanding costs.

9. Decision 2410/11 (April 3, 2012)

The plaintiff was struck by a pickup truck that was plowing snow, while she was walking through her employer's parking lot on the way to work in the morning. The truck was driven by GB, owned by FB, and leased by D. The plaintiff decided to sue rather than claim WSIB benefits and sued GB, FB and D. D brought a s.31 application for a declaration that the plaintiff's action against two other defendants, GB and FB, was taken away.

The plaintiff's employer did not participate in the hearing, but sent an observer. Following the hearing, the observer contacted the Tribunal to provide a copy of the snow removal contract between the employer and snow removal company. Neither the applicant nor respondent objected to the admission of the contract, so it was admitted and both parties were invited to make written submissions on it.

The first issue at the hearing was whether the plaintiff was a worker in the course of her employment at the time of the injury. The Vice-Chair held that she was.

The Vice-Chair considered the contract which had been admitted after the hearing, and concluded that the employer owned the parking lot and controlled its maintenance. The Vice-Chair referred to prior Tribunal decisions which have generally held that a worker is found to be in the course of employment if they were in an employer-controlled parking lot while coming to work, as this is reasonably incidental to employment. She held the plaintiff was in the course of her employment when she was injured.

However, section 28(4) of the WSIA provides that a right of action is not taken away if any employer, other than the worker's employer, supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers. Here the snow removal truck was rented, and D, the leasing company, did not provide workers, so the plaintiff's right to sue was not taken away against D. The issue was whether the right of action was taken away against GB and FB, neither of whom participated in the hearing.

The Vice-Chair followed previous Tribunal decisions which have held that the s.28(4) exemption only applies to the employer who supplied the vehicle without also supplying workers; that is, the employer who supplied the vehicle without also supplying workers is the only entity against whom the action may proceed. Other employers and workers are still protected from suit. "The removal of the right to sue applies to employers who had workers in the course of employment at the time of the accident, but not to employers who do not have that essential compensation nexus."

However, the Vice-Chair found on the evidence, including the contract that was submitted after the hearing, that because GB was an owner and was driving the truck at the time of the accident, GB and FB were not workers acting in the course of their employment. Hence the right of action was also not taken away against GB and FB.

D, the rental company, has commenced an application for judicial review. The Tribunal has raised concerns with the application materials, which the applicant is currently considering.

10. Decisions 1093/11 (July 25, 2011) and 1093/11R (December 13, 2011)

The worker injured his back in 1986. He injured his shoulder in 1993. Tribunal Decision 1022/02R3 found the worker was entitled to benefits for his shoulder on a disablement basis. The Board then granted entitlement to a LMR assessment to identify an appropriate SEB. An ARO decision found the suitable employment or business (SEB) was a retail trade manager, and based the worker's temporary disability benefits and his FEL on deemed mid-entry wages for this SEB. The worker appealed to the Tribunal, alleging the SEB was not suitable, and the deemed wages were too high.

The worker's appeal was denied. The Vice-Chair found that the SEB of retail trade manager was appropriate because it included the job the worker had been doing since 2000. The worker was operating his own small store. This employment was suitable given the worker's restrictions and his vocational background.

The Vice-Chair also found that the deemed wages were suitable. Even though benefits are usually calculated based on actual wages, since the worker was self-employed the actual earnings did not reflect his actual wages. The worker lived above his store in Quebec, and used the store's vehicle and food. He paid his spouse a salary. The Vice-Chair also found it was appropriate to use the Ontario based wage calculation even though the worker now resided in Quebec.

The worker's application for reconsideration was denied. The worker argued the Vice-Chair was biased towards the worker because she questioned the accuracy of the worker's tax returns, and that the Vice-Chair failed to consider factors that would suggest the earning capacity should have been based on higher wages. The Vice-Chair found that there was no reasonable apprehension of bias, as she had not suggested the Applicant cheated on his tax returns as the worker alleged. Decision 1093/11 relied on Tribunal jurisprudence in calculating appropriate earnings for self-employed workers, and this does not demonstrate bias. Further, the Vice-Chair pointed out that she had found the Board's calculation, which was based on average rather than high end wages, was appropriate.

In June 2012, the Applicant commenced an Application for judicial review.

11. Decision 2484/11 (February 15, 2012)

The worker injured her wrist at work in 2006. She then stopped work in 2007, when she was diagnosed with tenosynovitis in the same wrist. She appealed entitlement to LOE benefits from September 2007 to February 2008, and from March 2008. The Vice-Chair allowed the worker's appeal in part, finding she was entitled to full loss of earnings benefits from September 2007 to October 2007, but not after that date.

The Vice-Chair found on the evidence that the worker had failed to accept suitable work offered by the employer. Even though the worker was subsequently granted CPD entitlement, this did not mean she was incapable of performing the work offered.

The worker commenced a reconsideration application, and then withdrew it to start an application for judicial review.

Recent Decisions

Combined Values Chart (CVC) and the Charter

Decision 681/10 (May 2012) finds that the reduction of a worker's NEL award through the application of the Combined Values Chart (CVC), pursuant to the AMA Guides, does not violate section 15 (equality rights) of the *Charter* or the Ontario *Human Rights Code* (*Code*).

The worker had a 1992 accident resulting in a combined NEL award of 34%. In 1998, he sustained further injuries totalling a 35% NEL award. The Board combined the rating from the 1992 injury with the 1998 rating by applying the CVC, which resulted in a 60% NEL award. The worker also received LMR benefits and a partial LOE award based on a revised SEB. The worker challenged the NEL award calculation, arguing that the reduction of his awards by the use of the CVC amounted to discrimination on the basis of disability.

The Panel reviewed the philosophy of the AMA Guides, used to calculate NEL awards. It noted that the concept of "combining" impairments using the CVC is integral to the application of the AMA Guides and is used throughout the rating process. The Panel also noted that under the WSIA, workers are compensated for losses of earnings with LOE benefits. Workers with permanent impairments receive NEL awards, based on the percentage of physical or functional abnormality or loss, not on earnings. This system is different from the prior pension scheme in the worker's compensation system whereby workers were compensated for impairment of earnings capacity based on the nature and degree of disability.

The test on a section-15-of-the-*Charter* claim is, first, whether the law creates a distinction based on an enumerated or analogous ground (in this case disability); and second, whether the distinction creates disadvantage by perpetuating prejudice or stereotyping. The Supreme Court of Canada decision in *Withler* v. *Canada*, 2011 SCC 12, did not change the test, but it did remove the strict requirement of establishing a mirror comparator group.

The Panel found that the application of the CVC did not create a distinction on the basis of "disability," an enumerated ground. It found a distinction, if any, by the CVC was made on the basis of a "permanent impairment" not "disability." The Panel agreed with Decision 1529/04 that the distinction is based on the neutral and rationally defensible policy goal of assessing permanent impairments in accordance with the prescribed rating schedule, not on the basis of "disability." Even if there was a distinction, however, the Panel did not accept that such distinction was discriminatory. There was no disadvantage that perpetuated prejudice or stereotyping. The CVC and its application were consistent with the general purposes of the WSIA to provide compensation for work related permanent impairments, and the use of the AMA Guides provides a neutral basis for assessing impairments. Further, the NEL benefit is tailored to the individual worker based on the worker's personal circumstances, including the medical evidence regarding the worker. The real impact of the CVC, the AMA Guides and NEL was that they met the needs of the worker group, including providing compensation for impairments from workplace injuries, and provide ratings on a holistic basis, using a neutrally based rating schedule, the AMA Guides. There was no persuasive evidence of impact on the worker's human dignity.

The Panel then considered the *Human Rights Code* argument. The Panel, following *Ontario* v. *Tranchemontagne*, 2010 ONCA 593, found that test for discrimination under the *Charter* applied to the *Code*. There was no discrimination under the *Code*.

Executive Officers

In Decision 1174/11 (April 2012), the Panel considered whether eight persons working for a family business were "workers" or "executive officers" for insurable earnings purposes. Following an audit in 2008, the employer appealed an audit of the status of eight individuals who occupied six positions from 2003 to 2007. These individuals were listed on the company's Officers' Register, but did not occupy the specific positions listed in the Board's policy so as to qualify as "executive officers."

The Panel noted OPM Document No. 12-03-03, "Who can Obtain Optional Insurance," applicable as of January 1, 2007. It provided that the appointment of an executive officer must be verifiable through appropriate and current documentation such that the name of the executive offer must be recorded in the employer's minute book and that the status of an executive offer can be verified in other documents that the WSIB may review. As the appeal concerned the period from 2003 to 2007 inclusive, the prior version of the policy was also relevant to 2003; that prior policy, however, did not specify the requirement that an appointment of an executive officer be verifiable through appropriate and current documentation. The Panel relied on Tribunal case law which indicated that while the policy had an identification requirement in 2004, it was not a new threshold to be met by all individuals to qualify as an executive officer. All policy versions over the last several years contained a notwithstanding provision which focused on the substance of a person's role within an organization.

In this case, the individuals were general managers of their particular divisions and were directing minds of the corporation through participation in the executive committee. The Tribunal found that, substantively, their duties support the individuals' status as executive officers. The employer's appeal was allowed.

Prostate cancer from occupational exposure as welder/millwright

Decision 1507/11 (April 2012) considered entitlement for prostate cancer, which the worker attributed to workplace exposures to cadmium and polyaromatic hydrocarbons (PAHs) as a welder/millwright during his employment from 1968 to 2001. In 2005, the worker was diagnosed at age 57. The Panel found that the worker had daily moderate exposure to cadmium and routine high exposure to PAHs. Also, there was a lack of adequate ventilation according to reports from the Ministry of Labour. The worker's family history was negative for prostate cancer.

There was no applicable Board policy relating to prostate cancer, and therefore the Panel considered the appeal on the merits and justice, with regard to the general principles of causation. It is well established in Tribunal jurisprudence that scientific certainty is not required to grant entitlement, as the nature and quality of evidence required to persuade the scientific community of a causal link sets too high a standard for determining legal causation. The Panel also noted that in evaluating causation and dealing with epidemiological evidence, epidemiological evidence is not determinative but must be evaluated in conjunction with the facts of the individual case. It was not necessary to establish that occupational exposure is the sole cause of the development of the worker's disease.

In coming to its conclusions, the Panel considered a Board paper regarding prostate cancer risk and cadmium exposure. The paper appeared to indicate that there was inconclusive evidence for an increased risk of prostate cancer with occupational cadmium exposure. The Panel also

considered the views of a medical consultant, who opined that significant exposure to PAHs in the workplace is likely a material factor in early onset prostate cancer. The Panel obtained an opinion from a Tribunal assessor, who indicated that it seems plausible to conclude that cadmium may play a causative role in some cases of prostate cancer. The assessor also noted that while current epidemiological evidence regarding prostate cancer and cadmium exposure is not strong, the ability of studies to detect an association is questionable. Further, there was strong experimental evidence supporting the biological plausibility of a causal association. In addition, there were the facts which led the Panel to conclude that the worker's occupational exposures made a significant contribution to the onset of prostate cancer, including the young age of onset, history of occupational exposure in a poorly ventilated environment over 30 years, the evidence of potential effects between PAH and cadmium exposure, and lack of family history. There was no basis for finding that smoking overwhelmed the causal contribution of the worker's occupational exposure.

The Panel noted that given the current state of epidemiology, the decision was one decided specifically upon its facts. Given the medical reports and the facts of the case, the worker's occupational exposure made a significant contribution to his development of prostate cancer. The appeal was allowed.

Parkinson's disease from occupational exposure in chemical plant

Decision 1804/09 (April 2012) considered entitlement to Parkinson's disease, which the worker claimed arose as a result of occupational exposure in a chemical plant. In 2002, he was diagnosed at age 61. He retired in 2004. The Panel accepted the worker had some level of exposure to carbon disulfide from 1998 to 2002, n-hexane exposure from 1973 to 1990, and potential for mercury exposure from 1970 to 1972 or 1973. The worker was not likely exposed at levels exceeding acceptable limits. The issue before the Tribunal was whether the occupational exposures made a significant contribution to the development of the worker's disease.

In coming to its conclusions, the Panel considered a background WSIB paper and an assessor's report. The paper indicated that chronic exposure to neurotoxicants can interact with Parkinson's disease to hasten the progression of the disease, leading to a younger age at onset. Work-relatedness might be considered where the age of onset is 52 or younger, there is sufficient occupational exposure history and non-work-related factors have been ruled out. The assessor's report opined that the worker's diagnosis of idiopathic Parkinson's disease was not related to the occupational exposures. The assessor did not appear to accept that occupational chemical exposure may cause, contribute to, or hasten the onset of idiopathic Parkinson's disease.

The Panel denied the appeal as the weight of the evidence did not support a conclusion that the occupational exposure made a significant contribution to the development of the worker's Parkinson's disease at age 61. Parkinson's disease is not an uncommon condition in the general population. The Panel could not assume the worker's condition is work-related in the absence of supportive evidence regarding the nature and extent of his exposure and clinical presentation. The Panel also noted that in evaluating causation and dealing with epidemiological evidence, epidemiological evidence is not determinative but must be evaluated in conjunction with the facts of the individual case.

While the Panel was satisfied that the worker's Parkinson's disease was not caused by workplace exposures, the Panel considered the background paper as a broader approach to the evidence. The Panel found that the worker's occupational exposure to chemicals did not exceed acceptable limits. The exposure was intermittent and low level. It was not a significant contributing factor in the development of the worker's Parkinson's disease at age 61. The benefit of the doubt did not apply as the evidence was not approximately equal in weight. The appeal was denied.

WSIAT
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